Office Supreme Court
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ROBERT T. BENDINEY,
Clerk.

No. 104.

SUPREME COURT

Brf. of Cotter for Appellees.

UNITED STATES.

Filed Nov. 17, 1902.

OCTOBER TERM, 1902.

NO. 104.

THE BOSTON AND MONTANA CONSOLIDATED COPPER AND SILVER MINING COMPANY,

Appellant,

vs.

THE CHILE GOLD MINING COMPANY, JOHN MACGINNISS, EDWARD L. WHITMORE, CARLOS WARFIELD AND STEPHEN S. RAYMOND,

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

BRIEF FOR APPELLEES.

JOHN J. McHATTON,
JOHN W. COTTER,
Counsel for Appellees.

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STATEMENT.

The appellant's statement is incorrect. We do not know why its counsel should have failed to state the true facts in this case and in Cause No.

103. The statements contained in appellant's brief are inaccurate and there is contained in the brief in Cause No. 103 reference to matters alleged to exist, but which are not shown by the record. The Court, of course, will not look beyond the record or consider any matter not contained therein or shown thereby to exist. There was no application to dismiss the action as stated by the appellant. The appellant refers to the bill of exceptions. (P. 36.) The fact is that the cause was determined by the United States Circuit Court of Appeals, Ninth Circuit. Its mandate directing the dismissal of the bill for want of jurisdiction appears on page 34 of the record; the judgment entered in accordance with said mandate appears on page 35. The appellant is not seeking to review any judgment of the Circuit Court for the Ninth Circuit, but it is endeavoring to review the decree of the United States Circuit Court of Appeals.

Chile Gold Min. Co. et al. vs. Boston & M. Consol. Copper and Silver Min. Co. 93 Fed. 987.

I.

ON THE MOTION TO DISMISS.

By reference to the complaint (record, 1), it will be seen that the cause of action attempted to be alleged therein is:

1. That the complainant is the owner and entitled to the possession of the portion of the Pennsylvania lode claim described therein.

2. That the defendants entered in the premises and extracted ores therefrom.

3. That said ores were of the value of $75,000.

4. That the defendants have continued to mine ores therefrom and will continue to do so unless enjoined by the order of the Court.

5. That the ground is valuable almost exclusively for the ores therein contained, and which the defendants are threatening to extract, which are of the value of more than $50,000.00.

6. That the complainant has no means of knowing the quantity and value of the ores which will be extracted by the defendants, and that unless it is enjoined the complainant will be obliged to begin a multiplicity of suits.

We submit that this complaint showed no jurisdiction in the Circuit Court; it does not disclose the existence of any federal question or that it will

be necessary that the Constitution or any law of the United States should be construed in the determination of the action. The allegations contained in the complaint and placed therein in an attempt to disclose the existence of a federal question are immaterial and irrelevant, and are no part of a statement of the plaintiff's alleged cause of action.

The appeal here is sought to be taken:

1. Not from a judgment of the United States Circuit Court, but from a judgment of the United States Circuit Court of Appeals. The appeal should be dismissed.

Aspen M. & S. Co. vs. Billings, 150 U. S. 31.

2. The complaint does not show the existence of any federal question, or that a construction of the Constitution of the United States or any law of the United States is necessarily involved in the determination of the action. We think it clear that, aside from the failure of the complaint to present any federal question or to show that the action involves the construction of the Constitution or any law of the United States, that the same fails to show jurisdiction in the United States Circuit Court for the reason that it does not show that the complainant was in possession of the premises claimed to be owned by it at the time of the commencement of the action.

We refer the Court to the following cases and the authorities therein cited:

Cosmos Exploration Co. vs. Gray Eagle Co., 112 Fed. 4;

U. S. Mining Co. vs. Lawson, 115 Fed. 1005.

In further support of this motion we beg to refer the Court to, and have it consider, the appellees' brief filed in Cause No. 103.

II.

ON THE MOTION TO AFFIRM AND ON THE MERITS.

We respectfully submit that the motion to affirm should be sustained on the grounds:

1. That this appeal is not taken from a final judgment of the Circuit Court of the Ninth Circuit, District of Montana, but was sought to be taken from the judgment of the United States Circuit Court of Appeals for the Ninth Circuit.

2. Because the facts stated in the complaint are not sufficient to show that the Circuit Court had jurisdiction in that it appears that the complainant was not in possession at the time the action was brought, and in that it further appears that

no federal question was involved. It is plainly evident that the plaintiff's statement of its cause of action does not involve the consideration of the construction of the Constitution or any law of the United States.

For further discussion and the authorities in support thereof we beg to refer the Court to appellees' brief filed in Cause No. 103, and to have the same considered by the Court in determination of this case.

We confidently pray the judgment of the Court in favor of the appellees.

Respectfully submitted,

JOHN J. McHATTON,
JOHN W. COTTER,
Counsel for Appellees.